

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**May 29, 2013**

Diane M. Fremgen  
Clerk of Court of Appeals

**NOTICE**

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A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

**Appeal No. 2013AP413**

**Cir. Ct. No. 2011TP306**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**IN RE THE TERMINATION OF PARENTAL RIGHTS TO  
JEREMIAH W., A PERSON UNDER THE AGE OF 18:**

**STATE OF WISCONSIN,**

**PETITIONER-RESPONDENT,**

**v.**

**ROY W.,**

**RESPONDENT-APPELLANT.**

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APPEAL from a judgment of the circuit court for Milwaukee County: CHRISTOPHER R. FOLEY, Judge. *Affirmed.*

¶1 CURLEY, P.J.<sup>1</sup> Roy W. appeals the judgment terminating his parental rights to Jeremiah W. Roy W. argues that the trial court erroneously

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<sup>1</sup> This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2) (2011-12). All references to the Wisconsin Statutes are to the 2011-12 version unless otherwise noted.

exercised its discretion when it determined, after the State had proven the grounds for termination, that it was in Jeremiah's best interests that his parental rights be terminated. Roy W. submits that "virtually every statutory fact[or] weighs in [his] favor" and "the only reason grounds existed to terminate [his] parental rights was because he went to prison for sixteen months." A review of the evidence supports the trial court's determination that the State proved the grounds for termination of Roy W.'s parental rights, and that the trial court properly exercised its discretion when it determined that it was in Jeremiah's best interests to be placed for adoption, with the expectation that his foster mother will adopt him. Consequently, this court affirms.

### **BACKGROUND**

¶2 Jeremiah was born on May 11, 2010, with cocaine in his meconium.<sup>2</sup> As a result, he was taken into protective custody and placed outside the home when he was two days old. He has remained with the same foster mother since that time. The foster mother is the designated adoptive parent who has already adopted two of Jeremiah's half-sisters. Roy W. was adjudicated Jeremiah's father in June 2010.<sup>3</sup> A CHIPS dispositional order was entered on September 20, 2010.<sup>4</sup> Roy W. was given the following goals and corresponding assistance that he needed to achieve before Jeremiah would be returned to him:

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<sup>2</sup> Meconium is "a dark greenish mass of desquamated cells, mucus, and bile that accumulates in the bowel during fetal life and is discharged shortly after birth." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 1401 (1993).

<sup>3</sup> Jeremiah W.'s mother was married to another man at the time of his birth.

<sup>4</sup> CHIPS is an acronym for "child in need of protection or services."

Roy will have positive interaction with his son demonstrated by successful visitations and displaying nurturing behaviors, such as, showing love and patience with him and concern for his well-being. He will understand and engage in age[-]appropriate and developmentally[-]appropriate activities.

Services to target behavior change:  
Parenting Class  
Parenting Assistance

Roy will demonstrate that he understands how his decisions and behaviors affect the safety and well-being of his child. He will be cooperative with his parole office and participate in all the requirements of his parole, refrain from illegal activity, and ensure that his home will be free of any persons deemed unsafe; such as those having[] criminal, neglect or CPS history, involved in any drug or criminal activities or AODA abuse. Thereby understanding when he does, his child is safe.

Services to target behavior change:  
AODA Assessment  
Regular [R]andom Urine Analysis

Roy provides for his child's basic needs demonstrated by maintaining stable housing, have working utilities, ensuring that the home has adequate food to meet his child's developmental needs, provides clothing, diapers, a crib, and takes Jeremiah to all of his medical appointments.

Services to target behavior change:  
Parenting Assistance

¶3 Roy W. was also warned that, pursuant to WIS. STAT. § 48.356 (2009-10), the State could bring an action resulting in the termination of his parental rights and listing the grounds that could be alleged.

¶4 In an attempt to meet the goals for obtaining custody of Jeremiah, Roy W. obtained employment, worked at his parenting skills to the point where he was allowed overnight visitations with Jeremiah, and took parenting classes. In fact, the worker assigned to the case had filed a change of placement to move placement to Roy W.'s home. The guardian ad litem objected to this change, but

no hearing was ever held because, unfortunately, during the pendency of the CHIPS case, Roy was re-incarcerated for approximately sixteen months.

¶5 On October 10, 2011, the State filed a petition seeking the termination of the parental rights of Roy W. and Annette C. to Jeremiah W.<sup>5</sup> The petition stated that Jeremiah had been found to be a child in need of protection or services in a dispositional order dated September 20, 2010, and that, pursuant to WIS. STAT. § 48.415(2), he continued to be a child in need of protection or services despite the reasonable efforts of the Bureau of Child Welfare to provide appropriate services to Roy W.

¶6 With regard to this first ground, the petition stated:

[Roy W.] has violated the terms of his probation, leading to his being kept in custody and therefore unable to parent the child on a full-time basis. This demonstrates that [Roy W.] does not understand how his decisions and behavior affect the safety and well-being of the child.

....

[Roy W.] does not have safe, stable, suitable housing for himself and his child, as he is in custody and will remain so until approximately December 2011.

[Roy W.] failed to complete a fatherhood parenting class.

[Roy W.] has interfered with the placement of the child and failed to cooperate effectively with others needed to help care for the child. He has yelled at the foster parent and made threats concerning visitation with the child's siblings.

[Roy W.] has in no manner demonstrated the ability to meet the daily needs of the child on a consistent basis.

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<sup>5</sup> Annette C. is not a party to this appeal.

¶7 Another ground for termination alleged that Roy W. had failed to assume parental responsibility as defined WIS. STAT. § 48.415(6). The petition contained the following:

Roy [W.] has a history of criminal behavior that has led to his being in custody and therefore unable to parent the child on a full-time basis. [Roy W.] fails to demonstrate that he understands the Bureau's safety concerns related to his history of incarcerations. [Roy W.] continues to engage in behavior that leads to his involvement with authorities, including causing a disturbance and threatening [the child's mother] at the District Attorney's Office on May 17, 2010, shortly after the birth of Jeremiah [W].

....

The child, Jeremiah [W.], also has spent a substantial portion of his life in out-of-home care.

¶8 The State filed an amended petition for termination of Roy W.'s parental rights on May 7, 2012, which added the ground of abandonment as defined in WIS. STAT. § 48.415(1)(a). With regard to that ground, the State alleged that: "A dispositional order placing Jeremiah [W.] outside of a parental home was entered on September 20, 2010[,] and [Roy W.] has had no contact with him since on or about January 1, 2011. Further, your Petitioner alleges that there is no good reason for the abandonment."

¶9 After the petition was filed, Roy W. waived his right to a jury trial and a bench trial was held. Immediately after the trial, the trial court found Roy W. unfit. However, the trial court ordered a bonding assessment. Several months later, the trial court released a letter decision finding that it was in Jeremiah's best interest to terminate the parental rights of his parents. This appeal follows.

## ANALYSIS

### *A. Standard of Review.*

¶10 There are two phases in an action to terminate parental rights. First, the court determines whether grounds exist to terminate the parent’s rights. ***Kenosha Cnty. DHS v. Jodie W.***, 2006 WI 93, ¶10 n.10, 293 Wis. 2d 530, 716 N.W.2d 845. In this phase, “the parent’s rights are paramount.” ***Id.*** (citation omitted). If the court finds grounds for termination, the parent is determined to be unfit. ***Id.*** The court then proceeds to the dispositional phase where it determines whether it is in the child’s best interest to terminate parental rights. ***Id.***

¶11 Whether circumstances warrant termination of parental rights is within the circuit court’s discretion. ***Brandon S.S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 94 (1993); ***Gerald O. v. Cindy R.***, 203 Wis. 2d 148, 152, 551 N.W.2d 855 (Ct. App. 1996). In a termination of parental rights case, this court applies the deferential standard of review to determine whether the trial court erroneously exercised its discretion. *See* ***Rock Cnty. DSS v. K.K.***, 162 Wis. 2d 431, 441, 469 N.W.2d 881 (Ct. App. 1991). “A determination of the best interests of the child in a termination proceeding depends on the first-hand observation and experience with the persons involved and therefore is committed to the sound discretion of the circuit court.” ***David S. v. Laura S.***, 179 Wis. 2d 114, 150, 507 N.W.2d 4 (1993) (citations omitted). Therefore, “[a] circuit court’s determination will not be upset unless the decision represents an erroneous exercise of discretion.” ***Id.*** Furthermore, a trial court’s finding of fact will not be set aside unless against the great weight and clear preponderance of the evidence. ***Onalaska Elec. Heating, Inc. v. Schaller***, 94 Wis. 2d 493, 501, 288 N.W.2d 829 (1980).

*B. There was sufficient evidence to establish the three grounds for termination.*

¶12 At trial, various witnesses testified, including Roy W., who testified that he no longer had a relationship with Jeremiah's mother and did not know she was pregnant until six or seven months into her pregnancy. He also said he did not know that the mother was a drug user. He did visit with Jeremiah from the time of his birth until he was incarcerated on December 20, 2010, a period of approximately six months. He was not released from jail until February 21, 2012.

¶13 Roy W. claimed to have written several letters to the court concerning Jeremiah while incarcerated and to have received a response from the worker assigned to the case. He admitted, however, that he sent no letters or gifts to Jeremiah while he was incarcerated. He explained that he did not do so because he and the foster mother had a rocky relationship due to her saying some things about him that were not true, such as claiming that he came for unannounced visits and used profanity in front of her children. He also admitted getting a disorderly conduct ticket when he and Jeremiah's mother had a loud discussion at the Children's Court Center while attending a proceeding there involving Jeremiah. He testified that he has never lived with Jeremiah and did not, at present, have a substantial parental relationship with him. With regard to visits, Roy W. related that he had overnight visits with Jeremiah before he was taken into custody in December 2010, and once he was released in February 2012, he resumed visiting Jeremiah. Besides his conviction for armed robbery, Roy W. admitted that in the past he has smoked marijuana and sold cocaine.

¶14 The State also called the foster mother to testify. She testified that Roy W. was very hostile to her and yelled at her to the point where she did not

want him coming to her house. She also said he used profanity many times when he was at her home.

¶15 The family case manager also testified. She explained that originally Roy W. was not given custody of Jeremiah because time was needed to assess Roy W.'s parenting skills, and there were concerns about his being physically present to care for Jeremiah because of his history of incarceration. As a result, Roy W. was scheduled for various services, including parenting classes. She said that Roy W. never completed the parenting classes. When asked whether she believed Roy W. had the ability and desire to appropriately parent Jeremiah, she said, "I believe he has the desire but not the ability." She further explained that, "he can express that he wants to parent his child and he can verbalize it, but his actions prove differently."

¶16 The family case manager also explained that it is possible to keep in touch with children while incarcerated, but Roy W. had no contact with Jeremiah while he was incarcerated. She confirmed that Roy W. has never sent any cards or gifts to Jeremiah or called her home inquiring about Jeremiah while he was in custody.

¶17 The case manager also stated she did not receive regular or weekly phone calls from Carla Sloan, Roy W.'s fiancée, concerning Jeremiah while Roy W. was incarcerated. She was of the belief that Roy W. had not completed any of the conditions set forth in the CHIPS order. She also expressed the opinion that Roy W. might be able to meet several of the conditions in the next nine months, but not the condition that requires him to refrain from illegal activity.



¶18 Carla Sloan testified on Roy W's behalf. She claimed that she routinely called the worker and inquired about Jeremiah when Roy W. was incarcerated.

¶19 The trial court found, with respect to the first ground, that Jeremiah continued to be a child in continuing need of protection or services:

I think the critical issues are Element 4 in the Continuing Need of Protection and Services claim. And in particular this issue of likelihood that he is going to successfully re-direct his life from a rather protracted period of involvement in serious [c]riminal behavior.

As to the other elements I don't see a lot of issues here. Clearly he has not met the conditions of safe return as of the date of filing. Quite frankly, as of now clearly this child has been out of the home under a warnings compliant order [for] more than the requisite period.

¶20 The trial court also made findings concerning the ground titled "failure to assume parental responsibility":

As to the Failure to Assume Parental Responsibility, it is a given that he has not accepted and exercised significant responsibility for daily supervision, education, protection and care of this child for any appreciative period of time during the entirety of the child's life because of decisions he has made with regard to – with respect to his behavior.

No incarcerated parent can directly meet that standard.

....

[W]hat efforts he made to meet his responsibilities and provide for the daily supervision, education and protection and care of his child indirectly through relatives was not adequate because one relative wasn't fit and the other relative wasn't offered until way too late in [the] process. So he has not accepted and exercised significant responsibility for the daily supervision, education, protection and care for any appreciable period of time either directly or indirectly.

....

And then the [a]bandonment claim, you know, I – he didn't visit and he didn't communicate. And the issue is whether he has established good cause. And it [is] important to note that the burden shifts to him to establish good cause.

....

There is not good cause. He has not established good cause.

....

[W]e're talking about a period of time from January 1st to [ ] April 2011, to April of 2012, and he never sends a card, never sends a gift.

....

[N]ot being able to find time to make a card or get a card through [the foster mother] or get a Teddy Bear through [the foster mother] and get it to [the case worker] so it goes to this child, that ain't good cause. That is not good cause for not communicating with this child.

¶21 Finally, in addressing the last ground, the trial court found that in resolving the conflict in testimony as to how many letters were sent to the court or the case manager, the trial court said:

You got some credibility issues there. He says he communicated four times. It's his burden. He didn't meet his burden. There ain't four letters in here.

I've reviewed every entry. And I have put my fingers on every piece of paper in the CHIPS docket. There is one letter to the Court.

¶22 The trial court also resolved the claim made by Carla Sloan that she repeatedly called the case manager asking about Jeremiah when Roy W. was incarcerated. The trial court said:

... I don't find much credence in those assertions that there was constant communication attempts being made to communicate about the child through her as an intermediary....

....

The Failure to Assume I – he has not accepted and exercised significant responsibility for this child's care, daily care.

....

He doesn't have a substantial parental relationship with this child because of decisions that he has made.

¶23 Ultimately, the trial court determined that the State proved the three grounds and found Roy W. unfit. The trial court then ordered a bonding assessment. As noted, the trial court issued a written decision in which he found that the best interests of Jeremiah were met by terminating his father's parental rights and making Jeremiah available for adoption. In so deciding, the trial court wrote:

Jeremiah became the responsibility of the child welfare system essentially at the time of his birth. At that time, a presumption arose that his parents, with the diligent assistance of child welfare authorities, had to demonstrate that the safety issues which required our intervention had been resolved and demonstrate a capacity to safely parent within fifteen months (roughly August, 2011). Failing that, the law presumes that some alternative form of permanence is in the best interests of Jeremiah. Wisconsin Statute sec. 48.417. Jeremiah has been in out of home care as of this time for all of his life and nearly double the window of opportunity the law accorded to his parents to resolve parenting safety issues.

....

[Jeremiah] has a relationship with his father (and his wife) that Jeremiah recognizes and values. Due to factors primarily the responsibility of [Roy W.] the relationship has been far too intermittent and, as noted, is not a or the primary relationship in his life. While [Roy W.] sincerely believes that, given time, his recent diligent efforts to foster

that relationship would result in the blossoming of a primary parent relationship (and step-parent and half-sibling relationship), this argument only takes us full circle to the concerns addressed in the first two paragraphs. His time to nurture and bring to fruition that relationship was in the fall of 2010 when BMCW filed a notice of change of placement. Instead, [Roy W.] got himself arrested and incarcerated rendering him wholly unavailable to his son.

¶24 This court concludes that the trial court did not erroneously exercise its discretion in finding Roy W. unfit and in terminating Roy W.'s parental rights.

¶25 As can be seen in the trial court's decision, the fact that Roy W. was incarcerated did play a role in the finding of his unfitness and the termination of his parental rights; however, this was not the only factor which led to the termination of his parental rights. Unlike the circumstances found in *Jodie W.*, 306 Wis. 2d 128, ¶50, where our supreme court concluded "that a parent's incarceration is not itself a sufficient basis to terminate parental rights," here other factors contributed to the outcome.

¶26 With respect to the grounds for termination, while Roy W. does contest the trial court's decision to terminate his parental rights, it appears that he concedes that grounds existed to find him unfit when he writes in his brief: "by the time Roy was released, grounds existed to terminate his parental rights." In any event, this court is satisfied that all three grounds for termination were supported by ample evidence.

¶27 WISCONSIN STAT. § 48.426(3) sets out the factors that a judge must consider in determining whether termination of parental rights is in the child's best interest:

In considering the best interests of the child under this section the court shall consider but not be limited to the following:

(a) The likelihood of the child's adoption after termination.

(b) The age and health of the child, both at the time of the disposition and, if applicable, at the time the child was removed from the home.

(c) Whether the child has substantial relationships with the parent or other family members, and whether it would be harmful to the child to sever these relationships.

(d) The wishes of the child.

(e) The duration of the separation of the parent from the child.

(f) Whether the child will be able to enter into a more stable and permanent family relationship as a result of the termination, taking into account the conditions of the child's current placement, the likelihood of future placements and the results of prior placements.

¶28 Looking at the statutory factors, it is quite likely that Jeremiah will be adopted by his foster mother, into the only home he has ever known. While Roy W. insists that Jeremiah is still quite young, and if returned to his care Jeremiah may not remember that his father was absent for sixteen months, he ignores the other factors that weigh in favor of termination.

¶29 Roy W. argues that a "strong bond" exists between himself and Jeremiah. The bonding assessment does not support that statement. With regard to Jeremiah's bond with his foster mother, the author of the assessment wrote:

Observations of Jeremiah's interactions with [his foster mother] overwhelmingly suggest a secure attachment relationship between them, with [the foster mother] occupying the role of Jeremiah's Primary Attachment Figure (PAF). In this assessment session, Jeremiah utilized [his foster mother] as a "safe base" from which he explored the room, played with his sisters, and played with toys. Physical affection between [his foster mother] and Jeremiah was both frequent and spontaneous, and Jeremiah periodically returned to her lap for a few minutes, or

stopped to “reconnect” with her through eye contact, smiles, and physical contact between activities.

On the other hand, the author, in describing the bond between Roy W. and Jeremiah, observed that: “While an ‘attachment’ relationship is not overly evident between [Roy W.] and Jeremiah at present, observations of their play suggest the *potential* for such a relationship to develop between them over time.” (Emphasis added.)

¶30 Given the degree of bonding between Jeremiah and his foster mother, it is hard to imagine that removing him from her care would not have deleterious effects on Jeremiah. According to the bonding assessment, Jeremiah is also quite close to his sisters, who would also be missed by Jeremiah.

¶31 Addressing factor five—duration of the separation of the parent from the child—although sixteen months is not an extremely long time, it must be remembered that Roy W. admitted to not calling, sending a card or gift, and the trial court found that no family member inquired about Jeremiah during Roy W.’s most recent incarceration. Indeed, his failure to communicate with Jeremiah while incarcerated constituted abandonment. Although there were some half-hearted attempts by Roy W.’s fiancée to establish that she called and inquired about Jeremiah when Roy W. was incarcerated, the trial court did not find that testimony believable.

¶32 Finally, there can be little doubt that with the foster mother’s adoption of Jeremiah, Jeremiah will remain in a more stable and permanent family relationship as a result of the termination. Roy W. admitted to having a criminal history starting at the age of fifteen. He has never lived with Jeremiah or taken any responsibility for him. He has paid no support or done any of the myriad

duties attendant to fatherhood. He had been living with his fiancée's father in a small apartment that does not have room for a young child. By looking at Roy W.'s past conduct, the future does not look promising.

¶33 In contrast, the foster mother has cared for Jeremiah since his birth. She lives with her other children in what appears to be an extremely stable home. Consequently, the trial court properly determined that Jeremiah's best interests were met by terminating Roy W.'s parental rights. Accordingly, this court affirms.

*By the Court.*—Judgment affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)4.

